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No. 08-753

In the
# Supreme Court of the United States

OCEAN HARBOR HOUSE HOMEOWNERS ASSOCIATION,

*Petitioner,*

v.

CALIFORNIA COASTAL COMMISSION,

*Respondent.*

**On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Sixth Appellate District**

## BRIEF AMICUS CURIAE OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION AND HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## INTEREST OF AMICI CURIAE

The California Building Industry Association (CBIA) and Home Builders Association Of Northern California (HBANC), respectfully submit this brief *amicus curiae* in support of petitioner Ocean Harbor House Homeowners Association and in support of granting the petition for writ of certiorari, pursuant to Supreme Court Rule 37, to review the underlying decision of the state court of appeal. Written consent to the filing of this amicus brief has been granted by counsel for all parties.[1] Copies of such written consents have been lodged with the Clerk of the Court. CBIA and HBANC represent thousands of members throughout California involved in all facets of homebuilding and the provision of housing of all types. These *amici*, their members, and those seeking to buy, rent, or otherwise obtain shelter in California are seriously affected and adversely impacted by administrative actions and judicial decisions that fail to respect the constitutional constraints on development fees and exactions enunciated by this Court.

CBIA is a statewide nonprofit association with over 5,000 members active in all aspects of the housing

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief and acknowledged timely notice of intent to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

development and home-building industry throughout California. HBANC is a non-profit association with more than 800 members in Northern California. These associations, through their members and associates, represent hundreds of thousands of people including architects, engineers, homebuilders, contractors, suppliers, building trades, and allied professionals committed to meeting California's housing needs. The members of these associations develop and provide virtually every type of contemporary housing: single family, multi-family, for-sale, and rental. They are dedicated to reducing the barriers to achieving the American dream of home ownership and broadening the opportunities for all people to obtain housing throughout California.

Development exactions like the $5.3 million "mitigation fee" approved by the opinion below have huge impacts on the affordability and feasibility of housing throughout California, not just in the increasingly exclusive coastal domain under the authority of the respondent Commission. Such development fees and other exactions now commonly exceed $100,000 per single family home in many California jurisdictions, and operate to effectively exclude large segments of the public from obtaining affordable housing in many areas, as described below. The novel $5.3 million "recreational opportunity loss mitigation fee" invented by respondent Commission and approved by the state court below presents one of the more recent and extreme illustrations of such development exactions.

*Amici* and their members are directly affected by the increasingly pervasive and frequently disproportionate exactions imposed against of all types

of residential development by various agencies of government. *Amici* are also directly impacted by judicial decisions, such as the state court decision in this case, which undermine or confuse the constitutional principles limiting such exactions, as enunciated by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and more recently confirmed in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 548 (2005).

*Dolan* explained that a government agency exacting property as a condition of approval for development must demonstrate that the required dedication "is related both in nature and extent to the impact of the proposed development" and that the second part of this constitutional test requires "rough proportionality" between the exaction and the "impacts" of the development. The Court further explained that "general agreement exists" among the state courts surveyed that the exaction must have "some reasonable relationship to the needs created by the [development]."(512 U.S. at 391.) Therefore, the amount of the exaction must be shown to be roughly proportional to "the needs created by the development."

The state court opinion below acknowledged it was the respondent's burden to demonstrate that its fee met the constitutional rough proportionality test. (*Ocean Harbor House HOA v. California Coastal Commission*, 163 Cal. App. 4th 215, 234-38 (2008).) Thus, the respondent should have been required to demonstrate the costs of meeting "he needs created by"the approval of the petitioner's seawall, as this Court explained in *Dolan*. Instead the state court approved the respondent' fee on the basis of the purported "value" of cumulative individual recreational opportunities ostensibly impaired or "lost" as a result

of the seawall. This opinion thus raises, once again, the important question of how the requisite "rough proportionality" is to be demonstrated.

By changing the denominator of the "proportionality" calculation from the cost of "needs created by the development" to a more nebulous notion based on a subjective assessment of "lost recreational use opportunities", the state court allowed the respondent to add its own gloss on the *Dolan* mandates. The state court ruling thus portends even more significant erosion of this Court's efforts to maintain a constitutionally-based revetment against excessive or otherwise disproportionate exactions.

Indeed, other local governments in California have already cited this opinion as authority for new types of exactions, as described below. Such new exactions make only the flimsiest pretenses of "rough proportionality" or even disclaim any attempt to demonstrate such proportionality between their demands and the costs of public burdens fairly attributable to new development.

Accordingly, these associations respectfully appear as *amici curiae* to support the petition and urge the Court to grant the petition for certiorari to review the significant issues posed by this case.

## SUMMARY OF ARGUMENT

"Mitigation fees," such as those imposed by the respondent Coastal Commission in this case, and other increasingly-pervasive exactions demanded as conditions of approving land use changes and development permits now constitute a very large portion of the cost of providing new homes in California, and elsewhere. Such exactions, however, are necessarily subject to constitutional constraints, including the fundamental requirement that such exactions be shown to be reasonably related to adverse impacts on the public fairly attributable to the proposed development, both in nature and in extent. Respect for and enforcement of such constraints on exactions by state courts is not only essential for constitutional due process, but also for sound public policy and housing and economic reasons.

In *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), the Court held that exactions imposed as conditions of development approval must be shown to be "roughly proportional" to the projected impacts of the proposed development (*Id.* at 388.). The Court expanded on that by noting the general agreement that the proportionality relationship must be shown between the exaction and "needs created by the development" (*Id.* at 391.).

Here, however, the state court opinion approved an exaction that was purportedly justified by a claimed showing of proportionality on a basis differing from the requirements addressed in *Dolan*. Instead, the court approved the calculation of an ad hoc "mitigation fee" based on the purported "value" of individual and private "recreational opportunities" that would ostensibly be "lost" as a result of the Commission's

approval of a seawall and the anticipated eventual erosion of an acre of beachfront, rather than any new burdens on public facilities, services, or the Commission's resources. The state court opinion makes clear that respondent Commission consciously abandoned any such attempt to justify the exaction based on the estimated costs of providing an equivalent amount of beach ($1 million) or sand ($1.2 million), or based on the costs of meeting "needs created by the development." Instead, the $5.3 million exaction was purportedly justified only by the novel claim that the fee represented the value of lost "recreational opportunities." (*Ocean Harbor House HOA v. California Coastal Commission*, 163 Cal.App.4th 215, 234-38 (2008).)

Such "lost opportunities," however, do not constitute the appropriate measure of impact or burden on the public for the "rough proportionality" calculus required under *Dolan*. (See e.g., *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 883 (1996): "The [government] may not constitutionally measure the magnitude of its loss, or of the recreational exaction, by the value of facilities it had no right to appropriate without payment.") Since the state court opinion used the wrong basis—or at least a different basis than identified in *Dolan*—to measure or demonstrate the proportionality of the respondent's exaction, the decision invites this Court's review. This petition provides an opportunity for the Court to make it clear *how* an agency may try to demonstrate proportionality, i.e., the agency's exaction should be "roughly proportional" to what types of public burdens or impacts?

By approving the respondent's exaction based merely on speculative notions of the values of amorphous foregone opportunities for individuals to make recreational use of petitioner's beachfront property in anticipation of its eventual erosion, the state court opinion erodes one of the key limitations on exactions and opens the proverbial floodgates for the fabrication of exactions which go far beyond the "outer limits" of constitutional proportionality to public burdens.

The Court should therefore grant this petition and further clarify the relevant basis for demonstrating "rough proportionality," and more fully delineate those limits initially described in *Dolan*.

## REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

### I

### THE STATE COURT OPINION CREATES GREAT CONFUSION AS TO HOW THE *DOLAN V CITY OF TIGARD* "ROUGH PROPORTIONALITY" LIMITATION ON EXACTIONS SHOULD BE MEASURED AND DEMONSTRATED

New development may reasonably be required to "pay its fair share" of government's cost of providing additional public facilities or services the need for which may be fairly attributed to such new development. However, it is also true that government may not constitutionally exact more than a "roughly proportional" fair share of such costs or public burdens as a condition of approving new development. The Constitution bars the government from "forcing some people alone to bear public burdens which, in all

fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States*, 364 U.S. 40, 49 (1960); quoted in *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

In *Dolan*, the Court held that such constitutional principles require that exactions imposed as conditions of development approval must be "roughly proportional" to the projected impacts of the proposed development. (*Id.* at 388.)

While *Dolan* emphasized that "there are outer limits" as to how far governments might go in demanding exactions to advance even admittedly legitimate and laudable goals in meeting public needs (*Id.* at 396), the Court has not—yet—further delineated those constitutional boundaries.

State courts have thus far been hesitant to draw such "outer limits" themselves in the absence of this Court's further guidance and clarification.

Unsurprisingly, revenue-strapped local governments and regulatory bureaucracies continue to push against those "outer limits" and to demand more and more exotic, and extravagantly costly, development exactions, as illustrated in this case.

Moreover, governments have been increasingly unwilling to acknowledge their obligation to demonstrate evidentiary justifications for such development exactions and fees. For example, at least one city has argued to an appellate court that its municipal water connection fees could be justified "by throwing darts at a dartboard." (*Palermo at Lakeland LLC v. City of Bonney Lake*, 193 P.3d 168, 177 (Wn. App. 2008).)

Such candor as to local governments' perceptions of the prevailing laxity in state court review of exactions may be unusual and perhaps even refreshing. It also demonstrates the profound level of disregard, if not outright defiance, frequently accorded this Court's holding in *Dolan*. For the past decade, many local governments have unilaterally limited, circumvented, or disregarded *Dolan*. Many state courts have gone along. Amici and their members frequently encounter such cavalier approaches to satisfying the constitutional prerequisites to valid fees and exactions. The current case is a particularly vivid example and invites this Court's review and clarification of the constitutional standard of rough proportionality.

The state court in this case approved a novel $5.3 million "mitigation fee" created by the respondent Commission as one of many conditions to the Commission permitting installation of a 200 yard long seawall to protect the petitioner's existing homes from wave erosion and eventual collapse. *Dolan* noted that state courts generally agreed that exactions must be proportional to the "needs created by development." The Court also posited a hypothetical situation similar to this seawall's "encroachment" on the publicly-accessible beach, and suggested that a "reasonable" exaction in such a situation might be "to require petitioner to provide some alternative . . . space for the public either on her property or elsewhere." (*Id.* at 394.) The state court holding does not fit into any of the analyses used in *Dolan*.

By holding that constitutional nexus and proportionality requirements had been met by the respondent Commission's exaction of its mitigation fee,

the opinion allowed exactions to go far beyond the *Dolan* "outer limits", while at the same time asserting that the fee justification had exceeded this Court's requirements.

The Commission did not purport to justify the amount of its mitigation fee by the costs of replacing beach or sand, or otherwise actually "mitigating" the anticipated erosion of an acre of beachfront land. Although the Commission's staff presented evidence of appropriate mitigation fees based on such approaches (*Id.* at 394.), the Commission rejected these approaches. Instead, it exacted the $5.3 million fee based on the estimated "value" of ostensibly "lost" recreational opportunities based on projected beach usage hundreds of miles away from the site.

Although *Dolan* explained that "no precise mathematical calculation is required" for government to demonstrate such proportionality, the Court did make it clear that at least an appropriate numerator and denominator must be used in setting up even a "rough" proportionality analysis.

The amount of an exaction must be shown to be proportional to public burdens or impacts caused by, or occasioned by the proposed development, or "needs created by" development. (*Dolan*, *supra*, 512 U.S. at 390-91.) The cases the Court cited in *Dolan* involved burdens or impacts on public facilities and services that were allegedly caused by the activity for which approval was being specifically sought. *Dolan's* analysis of "rough proportionality" addressed the applicant's impact on government's cost of obtaining and providing property for the desired greenway/floodway. The Court did not indicate any basis for attempting to measure the proportionality of

the exaction in relation to the value of the possible loss of "opportunities" to provide bicycling pathways or floodway drainage.

Every land use decision involves some foregoing of "opportunities" to use that property for inconsistent alternative purposes. Those opportunities typically belong to the owner or occupant of the property, rather than to the government agency making the decision to permit the use. If the Constitution is to be deemed to permit government to charge a price for exercising its discretion to make land use decisions, and to set that price on the basis of speculative values of "lost opportunities" for individual members of the public to enjoy alternative uses of the property, rather than on the actual costs of meeting burdens on public facilities and services, such broad and near-unrestricted authority should be made clear by this Court. Otherwise, the state court's opinion stands for further undermining and confusing the standards described in *Dolan*.

## II

## THE STATE COURT'S OPINION IS ALREADY BEING USED BY OTHER GOVERNMENTAL AGENCIES IN CALIFORNIA TO TRY TO JUSTIFY OTHER NOVEL EXACTIONS OF PROPERTY

*Amici*, their members, and legal counsel representing them have already been confronted with other local governments in California invoking the state court opinion in this case as a form of justification for new types of development exactions.

For example, the City of Stockton, California, recently adopted a broadly-applicable "agricultural land mitigation policy" whereby the City now demands a new form of exaction as a standard condition of the City approving the development of any land currently designated for "agricultural" use to residential use. Such an applicant now must either dedicate to the City (or to its designated trustee) an amount of privately-owned land encumbered by a permanent conservation easement equivalent to the development area, or to pay fees "in lieu" of such dedication. There was no evidence showing that new residential development in any way causes or "occasions" any new needs for municipally-controlled privately-owned agricultural easements (or "city farms" as they are sometimes called.) An association of homebuilders has challenged the City's new exaction policy, and the City has defended it at trial by arguing, on the basis of *Ocean Harbor House HOA*, that the City did not need to show a nexus, and if such a showing of proportionality were required, the exaction could be justified on the basis of "lost opportunities" for individuals to continue to farm in the vicinity of the City. (*Building Industry Association of the Delta v. City of Stockton*, San Joaquin County Superior Court, Case No. CV032651, City's Trial Brief dated 10/02/2008, pp. 28-29. Court trial on Nov. 3, 2008, now under submission.)

*Amici* and their members report similar arguments in support of other exactions, such as "inclusionary housing" set-aside requirements and fees on housing as purported "indirect sources" of air emissions, are now being based, at least in part, on the state court's opinion in this case and its tolerance of the respondent's novel claim of "proportionality"

between fees and purported "impacts" on undefined opportunity losses, rather than measurable cost burdens on public facilities and services.

## III

## BECAUSE DEVELOPMENT FEES AND EXACTIONS NOW CONSTITUTE SUCH A LARGE FACTOR IN HOUSING AFFORDABILITY, IT IS ESSENTIAL THAT THE CONSTITUTIONAL PRINCIPLES LIMITING SUCH EXACTIONS BE CLARIFIED AND RESPECTED BY STATE COURTS

In many jurisdictions, fees and exactions cumulatively drive the cost of housing beyond levels deemed "affordable" by the much of the shelter-seeking public. Excessive or disproportionate fees and exactions thus operate much like now-discredited "exclusionary zoning" rules, imposing significant barriers to home ownership.

This phenomenon has been documented in a study by the State of California's Department of Housing & Community Development, entitled PAY TO PLAY: Residential DEVELOPMENT FEES IN CALIFORNIA CITIES AND COUNTIES (HCD, Sacramento, 1999) ("Pay to Play"):

"**California development fees are extremely high.** Single-family home builders in California in 1999 paid an average of $24,325 per unit in residential development fees, based on the results of our sample of 89 cities and counties." (*Id.* at p. 85.)

"Fees range widely, from a low of $11,176 per single-family subdivision home to a high of $59,703." (*Id.* at p. 103.) . . .

> "Measured as a proportion of average new single-family home prices, local development fees range from a low of 2% to a high of 20%. . . . Indeed, the more expensive the housing market, the smaller the contribution of fees to housing costs. Conversely, the more affordable the housing market—the greater the level of housing construction activity—the greater the share of housing costs attributable to development fees. This puts affordable housing advocates, including the authors of this Report, in the difficult position of having to argue for fee reductions in the very same communities who are already disproportionately shouldering the State's affordable housing burden. . . ." (PAY TO PLAY, p. 104.)

Other studies have demonstrated that the impact of such development fees on housing prices may be even more burdensome than revealed in the PAY TO PLAY study. For example, a 2002 study demonstrated that the average development fee load in the San Francisco Bay Area has risen to approximately $65,000 per house and identified at least one project in the City of Livermore where total fees exceed $118,000 per home. (Phil Serna, "*Milestone Hit as Livermore Fees and Exactions Top $100,000 per Home*," HBA NEWS (Homebuilders' Association of Northern California, July 2002).) More recently, the City of Livermore has pointed to the nearby City of Dublin as beating it in the development fee derby, claiming Dublin's fees now

average more than $130,000 per home. Other communities around Sacramento, California recently vied for having the highest local fees, in excess of $120,000 per home.

Likewise, California's Department of Housing & Community Development noted:

> "Their widespread use notwithstanding, residential development fees—which constitute the bulk of development fee revenues—are controversial on at least two counts. The first concerns the high degree of variation between jurisdictions regarding which fees are charged and their amounts. . . . A second issue of concern regarding local development fees concerns their contribution to the high cost of housing. Theory suggests, and some empirical studies demonstrate, that fees contribute directly to the higher housing prices, especially during periods of strong housing demand." (PAY TO PLAY, pp. 1-2.)

The State government, housing advocates, and providers of housing—including *amici* and their members—recognize the serious and potentially adverse effects of excessive or unreasonable development fees on the affordability of housing in California, and throughout the nation.

"Impact fees are subject to criticisms that, among other things, they ultimately drive up the cost of housing and unfairly burden newcomers to the area with providing public facilities for the entire community. F. Powell, *Challenging Authority for Municipal Subdivision Exactions* (1990) 39 DEPAUL

L. REV. 635, 636." (*Thompson v. Village of Newark* 768 N.E. 2d 856, 859 (Ill. App. 2002).)

For all these reasons, it is critical, not only CBIA, HBANC, and their members, but to the economic vitality of housing and development in California and throughout the United States that there be clearly enunciated, well-understood, and widely-respected guidance from this Court as to how the "rough proportionality" of fees and other exactions must be measured for purposes of demonstrating constitutional validity.

## CONCLUSION

The CBIA and HBANC, as *amici curiae*, therefore respectfully submit that the petition for writ of certiorari be granted.

DATED: January, 2009.

Respectfully submitted,

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